FILE COPY

Office-Supreme Court, U.S.
FILED
SEP 30 1960
JAMES R. BROWNING, Clerk

No. 381

In the Supreme Court of the United States

OCTOBER TERM, 1960

PUERTO RICO DRYDOCK & MARINE TERMINALS, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
Department of Justice, Washington 25, D. C.

STUART ROTHMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

MARION L. GRIFFIN,
Attorney,
National Labor Relations Board,
Washington 25, D. C.

INDEX

	Page
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	2
A. The Board's Findings of Fact	2
B. The Board's Conclusions and Order	6
C. The Decision of the Court of Appeals	7
Argument	8
Conclusion	11

CITATIONS

Cases:	
National Labor Relations Board v. *Local 160*, 268 F. 2d 185	10
National Labor Relations Board v. *Quest-Shon Mark Brassiere Co., Inc.*, 185 F. 2d 285	10
Radio Officers' Union v. *National Labor Relations Board*, 347 U.S. 17	8
San Juan Commercial Co., 111 NLRB 599	3
Universal Camera Corp. v. *National Labor Relations Board*, 340 U.S. 474	8
Wong Ken Foon v. *Brownell*, 218 F. 2d 141	10
Statute:	
National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*)	
Section 8(a)(1)	7
Section 8(a)(3)	7, 8
Section 8(b)(1)(A)	7
Section 8(b)(2)	7, 8
Miscellaneous:	
4 Wigmore, *Evidence*, § 1051 (3d ed.)	10

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 381

PUERTO RICO DRYDOCK & MARINE TERMINALS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

The opinion of the court below (Pet. 1a-9a) is not yet reported. The Board's Decision and Order (J.A. 45-57)[1] are reported at 123 NLRB 1298.

JURISDICTION

The judgment of the Court of Appeals was entered on June 9 1960 (Pet. 1a). The petition for a writ

[1] References are to the portion of the record printed as a Joint Appendix to the briefs in the court below. References preceding a semicolon are to the Board's findings; succeeding references are to the supporting evidence.

of certiorari was filed on September 2, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence on the record as a whole supports the Board's finding that petitioner violated Sections 8(a)(3) and 8(a)(1) of the National Labor Relations Act by acceding to a union request to discharge employees which petitioner had reason to believe was motivated, not by the employees' failure to tender union fees and dues, but rather by their activity on behalf of another union.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth at pp. 3-7 of the Petition.

STATEMENT

A. The Board's Findings of Fact

On May 18, 1954, the International Longshoremen's Association District Council, a parent labor organization supervising various affiliate locals, was certified by the Board as collective bargaining representative for petitioner's 100 maintenance and repair employees (J.A. 11-12). The employees in the unit were not at this time members of any active local affiliate of the ILA Council because Local 1674, to which they had bel ged, had ceased to operate in February 1954, fo wing the expulsion of the ILA

from the American Federation of Labor, and widespread defections of the Local's officers and members to UTM,[2] a rival labor organization (J.A. 12). *San Juan Commercial Company*, 111 NLRB 599, 601-602.

Accordingly, a majority of the employees did not pay dues to any ILA local affiliate but authorized the checkoff of ten cents of their wages each shift directly to the Council (J.A. 12-13; 333). In the summer of 1955, the president of the District Council, Moreno, instructed the employees to join and begin paying dues to affiliate Local 1575 (J.A. 13). This instruction was repeated in 1956 (J.A. 14; 127-128, 169, 172). But, because Local 1575 represented primarily longshoremen rather than maintenance men, many employees adamantly refused to join and pay dues to it (J.A. 13-14, 47, n. 4; 127-128, 169, 172).

When the employees learned in April 1956 that the new collective bargaining agreement drafted by petitioner, the District Council, and Local 1575 did not provide a retroactive wage increase which had been promised by Moreno, they formed a protest committee which requested the Company and the Unions not to execute the agreement and persuaded the president of the rival UTM to intercede on their behalf and likewise request a postponement of the matter (J.A. 15; 69, 131-134). These requests were ignored and the Unions and the Company proceeded to execute the contract, which contained a union-shop clause requiring union membership on or after the thirtieth

---

[2] Union de Trabajadores de Muellas y Ramas Anexas de Puerto Rico, IBL, AFL-CIO.

day following execution of the agreement or following employment (J.A. 15-16; 342).

The employees responded by notifying petitioner that they revoked consent to the checkoff of ILA District Council dues, repudiated the new contract, and authorized the UTM to represent them and sign a contract in their behalf (J.A. 16; 136-137, 390-391, 394-395). Petitioner replied that it was required by law to negotiate with the certified ILA District Council and to "comply with commitments validly made with it" (J.A. 16-19).

On June 11, 1956, the Unions notified the employees that unless they paid an initiation fee of $75.00, and accrued monthly dues to Local 1575, their discharges would be requested, pursuant to the union-shop clause of the contract (J.A. 19-20). The employees agreed to pay the monthly dues but refused to pay the initiation fee on the ground that they had already paid an initiation fee when they joined Local 1674 prior to its demise (J.A. 20-21; 142-143). District Council President Moreno replied that membership in the ILA had been forfeited by the employees' failure to pay dues to any affiliate local for more than six months and that reinstatement would require payment of another initiation fee (J.A. 21; 73-74).

Thereafter, the Union requested the Company to discharge seven employees, who, according to President Moreno, were selected because they were "the braves of Boston * * * who spread dissension among the full 100" (J.A. 50-51; 121). A protest work stoppage and violence then ensued. On July 2, 1956,

the Company discharged the seven employees, predicating its action on their participation in a contractually disapproved work stoppage and their delinquency in union dues and fees (J.A. 24-25).

On July 9, 1956, the discharges were rescinded and the employees returned to work, stipulating that they would pay the "debts they have with [ILA] because of dues" and would "guarantee labor peace" (J.A. 25-27). Union President Moreno, in petitioner's presence, told some of the employees that if they would "quit looking for private lawyers * * * and trying to get the UTM mixed up in the affairs there" they would "not have to pay a second initiation fee" (J.A. 48; 164-166, 156, 158-159, 167).

The employees refused to withdraw their support from the UTM (J.A. 166), and on August 3, 1956, the Company, at the Union's request, discharged twelve employees, including the seven previously discharged (J.A. 47-48; 380-391). The discharges were ostensibly for delinquency in the payment of dues and fees. However, one of the dischargees, Luis Rodriguez Arroyo, was not delinquent in his dues payments to a different ILA local in which he was a member in good standing; and another, William Aquino Reyes, had, with petitioner's knowledge, tendered his dues and initiation fee to Local 1575, but the tender had been twice rejected by the Union (J.A. 34; 220, 222, 223).

The day after their discharges, all twelve employees offered to pay the initiation fee and accrued dues to Local 1575 and repeated this offer several times, but the Unions consistently refused to accept payment

(J.A. 28, 49; 382).[3] On August 10, the presidents of the Council and Local 1575, Moreno and Ortiz, notified petitioner and the twelve dischargees by letter (J.A. 48) that the Unions had decided, *even before* the discharges on August 3, not to accept membership fees and dues from the discharged employees because of their part in the work stoppage and violence of July 2 and because of their "negative attitude to respect and obey the Constitution of this Union and its commitments" (J.A. 386-387).

This position was reiterated in affidavits given by the Union presidents to a Board agent prior to the unfair labor practice hearing. Presidents Moreno and Ortiz emphasized in the affidavits that the dischargees had been responsible for the July 2 strike, that their dues and fees delinquency "had nothing to do with our request to discharge," and that the Unions had already decided "to reject any offer of payment of dues" (J.A. 49; 389-390).

B. The Board's Conclusions and Order

Upon the foregoing facts, the Trial Examiner concluded that, except for Rodriguez Arroyo and Aquino Reyes (p. 5, *supra*),[4] the employees were discharged for their failure to pay dues and initiation fees to the Unions as required by the union-security provision of the contract, and hence their discharge did not

---

[3] Subsequently the other employees in the bargaining unit offered to pay their fees and accrued dues and were permitted to do so (J.A. 28).

[4] Petitioner did not except to this finding before the Board (Pet. 25).

violate the Act (J.A. 32-35). The Board, without disturbing the Examiner's factual findings, drew a different inference therefrom. The Board concluded that the motive for the discharge was not the dues delinquency, but rather the employees' activity on behalf of the UTM. Accordingly, the Board held that the Unions violated Sections 8(b)(2) and 8(b)(1)(A) of the Act by requesting the discharge of employees they believed represented "a threat to the Unions' tenure as bargaining agent" (J.A. 48), and that petitioner violated Sections 8(a)(3) and 8(a)(1) by acceding to this request when it had reasonable grounds for believing that the discharges were demanded for reasons other than a failure to pay initiation fees and dues (J.A. 51-52).

The Board's order required petitioner and the Unions to cease and desist from the unfair labor practices found, to reinstate the dischargees with back pay,[5] and to post appropriate notices (J.A. 53-57).

C. The Decision of the Court of Appeals

The court below (Judge Bastian dissenting) upheld the Board's unfair labor practice findings as adequately supported by the record, approved its reversal of the Trial Examiner's conclusionary findings as a reasonable exercise of its statutory responsibility, and enforced the order with certain modifications not relevant here (Pet. 1a-9a).

---

[5] Because one of the 12 dischargees was, on his request, omitted from the complaint, the Board's order requires reinstatement of only 11 employees (J.A. 48, n. 6, 54).

ARGUMENT

1. As stated in *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 40, "§§ 8(a)(3) and 8(b)(2) [of the Act] were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood." The first proviso to Section 8(a)(3), however, permits the employer and the union, in certain circumstances, to enter into an agreement requiring employees, as a condition of continued employment, to become and remain members of the union. An employee can be discharged under such agreement only for "failure * * * to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." A discharge to enforce any other union obligation exceeds the protection of the proviso, and thus falls under the ban of Sections 8(a)(3) and 8(b)(2).

The narrow question here is whether substantial evidence supports the Board's conclusion, sustained by the court below, that the employees were discharged, not for their dues delinquency, but rather because of their activity on behalf of a rival union. On the basis of the facts emphasized by the Board in its decision (J.A. 46-51), and by the court below in its opinion (Pet. 5a-6a), ample support exists for the Board's conclusion. Hence no issue warranting review by this Court is presented. See *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.

2. There is no merit to petitioner's contention (Pet. 28) that the Board reversed the Trial Examiner "solely by crediting the testimony and evidence of witnesses wholly discredited by [him], and by discrediting the testimony of witnesses credited by [him]." As the court below properly found (Pet. 6a-7a):

> * * * [T]he trial examiner and the Board differed as to which items of the evidence were of the greater weight and significance. * * * The crucial considerations were not considerations of demeanor but rather rested upon certain oral factual testimony which was undisputed, and upon letters, notices, and a transcript of a conference. * * * We cannot say that the conclusions of the Board were not supported by substantial evidence on the record as a whole, including the trial examiner's findings as part of that record. The Board did not ignore those findings; it referred to them, discussed the evidence, and differed with the examiner as to the conclusions * * * to be drawn from the evidentiary facts * * *. The Board's ultimate findings were rational, reasonable, and had support in the evidence as a whole * * *. This was the Board's responsibility under the statute.

Contrary to petitioner's contention (Pet. 28-29), the Board did not err in using the prehearing statements given by Union Presidents Moreno and Ortiz (p. 6, *supra*) to establish the truth of the matters set forth therein. These documents were not simply prior inconsistent statements offered for the purpose of impeachment, but were affirmative admissions by

an adverse party (J.A. 158). As such, the statements were competent evidence of the real reasons for the Unions' action. *Wong Ken Foon* v. *Brownell*, 218 F. 2d 444, 446 (C.A. 9); see 4 Wigmore, *Evidence*, § 1051, at 10 (3d ed.); cf. *National Labor Relations Board* v. *Quest-Shon Mark Brassiere Co., Inc.*, 185 F. 2d 285, 289 (C.A. 2). *National Labor Relations Board* v. *Local 160*, 268 F. 2d 185 (C.A. 7), cited by petitioner (Pet. 29), is distinguishable, for there the extrajudicial statements were found not to constitute admissions by an adverse party.[6]

Finally, the holding herein does not, as petitioner suggests (Pet. 33-34), preclude a union from limiting discharges for failure to pay dues to those employees who were instrumental in causing the dues "revolt." This case turns on the fact that the leaders

---

[6] The acknowledgement by the Union presidents—in their prehearing statements and in their letter to the employees (p. 6, *supra*)—that the discharges were not sought for dues delinquency provides adequate support for the Board's finding, without regard to the corrobative evidence of Falu Rosario and Rivera Amariles, which petitioner seeks to undermine (Pet. 29-32). In any event, petitioner's contention that the Trial Examiner discredited their testimony that Moreno, with the concurrence of petitioner's General Manager Crocco, offered to waive payments of a second membership fee if the men would abandon support of the UTM (p. 5, *supra*) is not based on any express ruling by the Examiner but merely on the assumption that he could not have reached his ultimate conclusion without rejecting that testimony. However, the Examiner's failure even to mention the testimony suggests only that this was one of the instances where, as the court below noted, "the trial examiner and the Board differed as to which items of the evidence were of the greater weight and significance" (Pet. 6a).

were discharged, not for the dues delinquency, but as a reprisal for their rival union activity.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

STUART ROTHMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,

MARION L. GRIFFIN,
Attorney,
National Labor Relations Board.

September 1960.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1960 566210 3R7